JUSTICE AND SECURITY GREEN PAPER

RESPONSE TO CONSULTATION

GUARDIAN NEWS AND MEDIA

These submissions are made on behalf of Guardian News & Media Ltd, in response to the Government's proposals as set out in the Green Paper on Justice and Security.

EXECUTIVE SUMMARY

- We consider that the proposals in Green Paper represent a serious and unjustifiable interference with the fundamental common law principle of open justice.

- The media plays an important role in reporting on the judicial process and judgments; providing information to the public on the justice system, and holding government and its agencies to account. The Green Paper proposes an unnecessary and unjustifiable restriction on the media's role as a public watchdog.

- Increasing secrecy prevents open justice and undermines confidence in the judicial system.

- The government fails to provide evidence of the necessity for the introduction of secret hearings, and the adoption of closed material procedures in all civil cases involving 'sensitive information'.

- The proposals are a disproportionate response to a handful of cases involving the security and intelligence services. Those cases concern allegations of serious wrongdoing and breaches of human rights. The court must not be deprived of its current role in balancing the public interest in secrecy and public interest in open justice in such cases.

- Currently CMPs are only used in limited circumstances, to mitigate the unfairness of coercive state action (for example, deportation appeals, control orders). Even this limited use of CMPs has been criticized as unfair and unjust.

- The proposed extension of CMP to all civil courts where sensitive information may arise, would threaten the independence of the Coroner in a range of inquests concerning matters of great public interest (for example, 7/7 Inquest, Jean Charles de Menezes, Terry Jupp (killed while testing counter-terrorism home made bomb) would have been in secret if this legislation was in place).

- The definition of 'sensitive information' is far wider than used in PII, and would include all sorts of information that is currently dealt with in open hearings.

- There is no evidence that the PII system (which continues to be used effectively in criminal proceedings including high profile terrorism trials) is ineffective.

- CMPs are unfair as the non-state party is denied rights including the right to attend the trial of their own action, to know the government's case, to challenge evidence nor to know the court's reasons for decision. These restrictions are particularly oppressive when the cases involve the citizen against the state, or potentially the

media against government bodies. The special advocate procedure is not an effective remedy to unfair, secret trials.

- The Green Paper would extend CMPs to all civil proceedings including inquests and would give the Secretary of State the power to determine whether any civil proceedings relating to sensitive material should be held in secret. The judge is effectively deprived of the ability to weigh the balance of the relative public interests in national security; fair trial and open justice.

- If the proposals are adopted, this would undermine confidence in the court and would allow government to conceal wrongdoing.

- The proposals deprive the media of any effective challenge to the Secretary of State's determination that sensitive material requires the case to be heard in secret.

- We see no justification in restricting Norwich Pharmacal applications in the way proposed and no convincing evidence is put to support the claim that this is necessary.

- Secrecy encourages speculation and inaccurate rumours, and would deprive the public of important information – including exculpatory information about government bodies.

- The ISC is failing to provide proper oversight and should become a committee of Parliament. We call for greater openness and accountability of government bodies.

As a news organization, we have serious concerns about the proposals and their impact on the judicial process, court reporting and public interest journalism. In particular, the introduction of a closed material procedure (CMP) in all civil proceedings would be a serious departure from open justice. The combination of closed hearings, secret evidence and secret pleadings and judgments, would result in the removal of information (and judicial precedent) from the public domain, probably indefinitely. The proposal that the Secretary of State should determine what is put in the public domain, subject only to a broadly defined test of harm to the public interest is disproportionate and unjustified.

While we recognize that the government has a duty to protect the important work of security and intelligence agencies and their intelligence sharing relationships, the recent cases concerning allegations of breaches of human rights show the need for government agencies to be accountable and for claims brought against the executive to be subject to judicial scrutiny and open justice. There is a real danger that CMP hearings will undermine confidence and therefore national security, giving the impression that the courts operate 'hand in glove' with the executive in an unfair, secret judicial process.

The Green Paper's proposals would seriously impact on the public administration of justice particularly where government or governmental institutions are involved as parties. The media has a role, recognised in law, as a 'public watchdog' and the operation of the open justice principle is an important element in this role. This would be severely restricted if the Green Paper's proposals are accepted. In the Binyam Mohammed case, concerning the government's attempts to redact 7 paragraphs from one of the Divisional Court's judgments the important balancing question was the interest in national security and *'the public interest in open justice, the rule of law and democratic accountability'*. BM (4) [18]. (Note that it was accepted by all parties that the contents of the 7 paragraphs were not damaging to national

security, just the fact that the source was US intelligence.) There is no evidence of damage to the public interest arising out of the publication of these paragraphs.

The Green Paper was written following a handful of cases concerning serious allegations of British complicity in torture and rendition of its own citizens and residents. These cases have arisen because of the alleged 'outsourcing' of torture and inhuman and degrading treatment, and the rendition of suspects to states where such practices are endemic. Torture is an international crime, and any evidence of complicity in torture must be open to scrutiny. The security services are not immune from accountability (and possible prosecution) for complicity or participation in torture. It is important that any such allegations are subject to public scrutiny, and CMPs would prevent this. It appears that the government has drafted the green paper precisely to avoid such scrutiny. The proposals may also impact on 'historic' litigation, for example that brought by Kenyans caught up in the 'Mau Mau' movement at the time of British colonialism – any future proceedings concerning past actions by the British government may also involve 'sensitive material' and be subject to secret hearings.

The proposed procedures would undermine the principle that justice should be dispensed in public, and represent a departure from the principle that all the parties are entitled to see and challenge evidence relied up on court. The unfairness and lack of transparency of CMPs is of great concern when the cases that are brought by the citizen against the executive: the executive has the power to determine what material should be put into closed session and effectively to control that litigation.

The definition of 'sensitive material' is far wider than in PII proceedings including *"any material or information which if publicly disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily sensitive, but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive.*' PII material is material whose disclosure could be damaging to national security, international relations or the prevention and detection of crime. The test in PII proceedings – that there should be compelling evidence to justify the creation of new PII categories, would not apply. The determination of whether the material is sensitive material is down to the Secretary of State, depriving the court of any real opportunity to assess the material objectively.

The Green paper suggests that the unfairness of secret CMP proceedings can be countered by ensuring that, the judge is able to see all of the sensitive material, and through the use of special advocate. We do not accept this point, which we note was argued unsuccessfully by the defendants in the Al Rawi case. Lord Kerr's response was as follows:

"... what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead."

Closed proceedings were first introduced in extremely narrowly defined cases, to protect those subject to coercive actions by the state, under terrorism legislation (for example deportation appeals /control order proceedings). It is widely accepted that even the current limited use of CMPs is flawed: in its 9th report the JCHR concluded that the special advocate procedure used in the CMPs 'is not capable of ensuring the substantial measure of procedural justice that is required.' We note that the special advocates in their own submission state that [we] *'believe that it would be most undesirable to extend CMPs any further'* and that there should instead be *'a review of the extent to which the current range of their application can be justified (as has previously been recommended by the Joint Committee on Human Rights)'*.

(Response to Consultation, 16 December 2011, [26]).

These issues do not solely concern the question of 'fairness to all parties'. Fairness in the judicial process also requires that proceedings should be open to public scrutiny and the press plays an important part in reporting court proceedings, examining the judicial process and holding the executive to account. Secret hearings would prevent news organizations from reporting important matters of public interest arising in judicial proceedings.

We note that the PII process has worked effectively for many years in national security cases, and would continue to operate in criminal proceedings. The Green Paper proposals only concern civil cases and there is no plan to change the law in respect of criminal trials, so PII will continue to operate in criminal cases. There have been numerous high profile terrorism trials in recent years in which intelligence material has played an important part and no CMP has been required in those cases. PII has been an effective procedure. This gives the lie that a change in the law is necessary.

The Green Paper suggests that CMP is fairer than the alternative, where (should a PII claim brought by government fail) a civil claim might be struck out and the Claimant denied any access to the court. The case relied upon is Carnduff v Rock [2001]. This was a not a national security case, it was a contractual claim brought by a police informant. It has been suggested that it has been wrongly decided (see Bingham Centre Response to Consultation [22]). The likelihood of a stay or strike out in a civil claim involving sensitive information is remote, and in those rare cases where it may happen, it could be argued that the interests of maintaining a credible judicial system and open justice is greater than the disadvantage occasionally suffered by one party – indeed this is already the case in PII proceedings where prosecutions may be dropped by the Government rather than having to rely on sensitive material and this has been accepted as a proper way to proceed in order to maintain judicial fairness.

The far-reaching and fundamental changes proposed, and their application to all civil courts, coroners' courts and other tribunals are not justified. The Green paper cites few examples of cases that might raise the issues, and the paper provides no evidence of actual harm done where the courts have not upheld PII certificates or other claims for non-disclosure in civil proceedings. In those very rare cases, the court has underlined the importance of open justice.

Context

It is important to remember the context of the few cases cited in the Green Paper. In the Binyam Mohammed litigation, the government sought to prevent publication of paragraphs 87 and 88 of the Divisional Court's judgment - these set out the court's conclusions and findings about the UK's involvement with alleged serious wrongdoing - the knowledge of and complicity in BM's torture and mistreatment. The court concluded that *'it is our clear view that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable pubic interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture.'* BM [4] [36]

We and other media organisations have challenged attempts by the Government to hide behind 'national security' when its real concern has been to hide information that is embarrassing to politicians and / or the security services. For example, the allegations of British complicity in torture made in recent cases and the inquest into the deaths of UK military personnel caused by 'collateral damage' / 'friendly fire' of US Air Force ground attack aircraft pilots in Afghanistan [2007].

The Green Paper's proposals would not only empower the Government to conceal its own wrongdoing or complicity in wrongdoing in any civil proceedings – it would also mean that

any sensitive exculpatory evidence that might clear government agencies would be heard in secret. Secrecy encourages inaccurate speculation and rumour, and if more hearings are held in secret, there will be less trust in government institutions and agencies. The increase in secret hearings damages the perception of the judicial process as one that is fair and independent. It undermines confidence in both the executive and the judiciary.

GNM has reported widely on allegations of British complicity in torture and, along with other newspapers, holding government to account. It was precisely through the media intervention and Binyam Mohammed's own lawyers pursuing this case that MI5 and MI6 involvement in wrongdoing came to light.

This led to damning comment by appeal court and high court judges, a long police investigation into MI5 and MI6, and - ironically - pressure leading to the government setting up of the (albeit limited) inquiry into British government complicity in torture, headed by Sir Peter Gibson, announced by David Cameron in July 2010.

It is important to remember that the former foreign secretary sought - unsuccessfully - to keep the Binyam Mohamed case secret, hiding behind 'national security' arguments in order to keep secret 7 paragraphs of the High Court's judgment which summarised the ill-treatment of Binyam Mohammed the Gibson Inquiry shows. If the proposals in the Green Paper were already enshrined in legislation much of the information about UK Government complicity in torture would never have entered the public domain. This would have been contrary to the public interest.

In summary, the Green Paper proposals for CMPs reverses fundamental fair trial and open justice principles which have been the bedrock of British justice for centuries. It is a disproportionate response to the few cases in which the civil courts have been called upon to consider intelligence material. Those cases raised serious issues about matters of important public interest. We would not have been able to know about Binyam Mohammed or other cases of MI5 and MI6 connivance in torture and abuse. It appears that this is precisely why the Government has drawn the Green Paper proposals.

Specific questions put in the consultation:

How can we best ensure that closed material procedures support and enhance fairness for all parties?

The question is based on the premise that a closed procedure is necessary in order for justice to be done. We do not accept that this is the case. Nor do we accept that the case has been made that there is a significant existing problem, that needs to be solved.

The introduction of CMP would infringe the constitutional right of open justice. It is fundamentally inconsistent with that right, making the presumption of secrecy the starting point. It would give rise to an excessive and disproportionate interference with the right to freedom of expression and public information about the judicial process itself, and the actions of the executive. We are concerned that the Green Paper proposes a system where even evidence of the gravest war crimes cannot he openly scrutinized. Claims that material is 'sensitive' could be used to prevent disclosure of serious wrongdoing by government or its many agencies. These claims could be extended by widely drafted legislation so that they go way beyond claims made by central government on behalf to security services. A counter

problem could arise, when exculpatory sensitive material is heard in closed session, that secrecy will lead to speculation and rumour about the activities of government agencies.

What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other properly interested persons?

The proposal would allow government to determine that inquests where sensitive material was involved should be heard in closed session using CMP. We oppose any moves to hold inquests in secret through CMPs, or to withhold information or extend reporting restrictions. We note that there are existing powers for coroners' courts to sit in private on national security grounds. Rule 17 Coroners Rules 1984 allows coroners to direct that "the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security to do so". The Coroners rules do not allow for secret hearings but the Coroner has the power to confine proceedings to 'interested persons' - at least the family and / or legal representatives; the Coroner has discretion to include others as interested person. Public Interest Immunity (PII) certificates can be issued if necessary.

The effect of the Green Paper's proposals is that inquests into highly contentious deaths, previously held largely in public and reported by the press, such as deaths in custody or deaths of individuals where issues of the state's conduct are raised, would be held in secret. Inquests into, for example, deaths of soldiers as a result of 'friendly fire' by US forces in Afghanistan, or the deaths of Terry Jupp and Jean Charles Menezes, could be largely held in secret. Were CMPs to be adopted, the families of victims would be denied the opportunity to hear and challenge evidence. In addition, in some circumstances the judge or coroner would be unable to give a proper explanation or reasons for the verdict or to make appropriate recommendations over matters dealt with in closed sessions. This would undermine the inquest, which would become a very limited form of inquiry, removing the key functions of a Coroner. The press would be unable to give a coherent account of the outcome of the inquest.

The *de Menezes* inquest is an example of one that dealt with difficult, sensitive issues including intelligence material on terrorism issues. When Jean Charles de Menezes was shot on 22 July 2005 there was widespread public concern that the Met may have been operating a 'shoot to kill' policy after the bombings of 7 July two weeks earlier. The de Menezes inquest involved the consideration of highly sensitive evidence such as the Met Police's operational response to the threat posed by suicide bombers, assistance the Met had had from Israel and the USA in developing this, and other aspects of undercover and surveillance operations. This was handled effectively within the existing rules.

Similar considerations apply to the inquest into the deaths of those on 7 July 2005. The Security Services pressed for the hearing to be held in secret but Lady Justice Hallett rejected this as incompatible with the coroner's rules. There was no damage to security as a result. At the end of that inquest Lady Justice Hallett's findings were published, and she made important recommendations such as a call for improvements in communication between transport and emergency services, a review of 'inter-agency major incident training for frontline staff' and improvements in London's emergency medical response, given the fact that it is to host the 2012 Olympics. In addition, LJ Hallett recommended that MI5 improve procedures aimed at getting the best intelligence from informants, and that the service keeps better records of how it assesses individuals who a threat to national security.
We do not accept that the proposals for handling sensitive inquests are necessary or proportionate.

Should any of the proposals for handling of sensitive inquests be applied to inquests in Northern Ireland?

See above

What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?

We do not support the use of closed material procedures, having considered that PII process is an effective mechanism for dealing with national security issues. The use of special advocates developed in the context of proceedings where the state exercised coercive powers, for example in deportation, control order, and terrorism asset freezing cases. It is a highly flawed and inadequate process that cannot provide for a fair trial, that undermines open justice and is not in the public interest.

In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No. 3) does not apply?

Where a CMP has been imposed, the gisting requirement - to give the claimant in open session some sense of the closed case against them - is always necessary, given the importance that the parties and legal representatives should know as much about the secret allegations and evidence against them as possible in order to argue their case. The gist of the case, and as much of the case as possible, should be provided in open court. We note that in A v UK and AF the court said that the parties to legal proceedings should be given 'sufficient information about the allegations against them' to allow them to give 'effective instructions in relation to those allegations'.

It is also important that the public is aware of the nature of such proceedings, through the media's vital role in reporting the judicial process.

At this stage the Government does not see benefit in introducing a new system of greater active case management or a specialist court. However, are there benefits of a specialist court or active case management that we have not identified?

There should be no new 'specialist' court to deal with secret civil proceedings, and no new powers to derogate from open justice. In all cases, the media must be able to challenge any application for material to be withheld, closed hearings or any reporting restrictions.

The Government does not see benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?

We do not see any benefit in extending the remit of the IPT, which is a wholly secretive body. If any such change were seriously considered, the proposed changes should be set out clearly and this should be the subject of a separate consultation.

In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?

The current system of PII is effective and does not need to be changed. The PII process, in which a judge weighs concerns of national security against the need for fair trial, and the freedom of expression involved in open justice has been used successfully and without harm to national security for many years.

The Green Paper's proposals would lead to the demise of the PII process for it is hard to imagine any case where government agencies would prefer to use PII proceedings, rather than the secret CMP hearings. The case *of Carnduff v Rock 2001* is cited as an example of a case that was struck out under PII, leading to possible unfairness to the claimant. This is a rare case, and the only example provided in the Green Paper of these exceptional circumstances. We note (as stated earlier) that national security was not involved, and we are not aware of any similar cases. Judges must be trusted to consider national security evidence to ensure that any claim to secrecy is not being used to hide material that is merely embarrassing to government, or that exposes wrongdoing. The independent judicial scrutiny of government claims of national security is vital in a democracy.

Any legislative test that is based on a statutory presumption against the open disclosure of sensitive material would be a disproportionate breach of the open justice principle and fair trial procedures. We also reject any presumption that whole classes of documents should be protected from disclosure.

What role should UK courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?

The BM case illustrates how such cases reveal information of great public importance and concern - that case led to the establishment of the Gibson Inquiry. The Norwich Pharmacal proceedings brought by Binyam Mohammed did not result in any damage to national security. The courts should retain the ability to assess any government claims for PII and to rule in favour of disclosure where appropriate.

We do not accept the proposal to remove the jurisdiction of courts to hear Norwich Phamaracal applications against government departments or agencies, or to remove the jurisdiction of courts to hear Norwich Pharmacal applications where sensitive material is involved. We also reject the suggestion that material held by or originated from one of the security or intelligence agencies should be protected by absolute exemption from disclosure, while non-agency material should enjoy exemption from disclosure based on a Ministerial certificate. This would seriously inhibit scrutiny of the activities of these agencies, and undermine confidence in our institutions.

We see no justification for these proposals and have seen no examples of actual harm suffered by the government as a result BM case and the grounds for CA's ruling. We note that the details that the government sought to redact from the BM court judgment were pronounced publicly in the US and the findings about his mistreatment and torture were accepted by the US government.

What combination of existing or reformed arrangements can best ensure credible, effective and flexible independent oversight of the activities of the intelligence community in order to meet the national security challenges of today and of the future?

We suggest greater openness rather than increased secrecy, including the amendment of official secrets legislation to allow for a public interest defence and improvements in the freedom of information legislation to allow for more open access to material concerning the activities of government and its agencies. Such scrutiny would encourage greater confidence in the activities of our intelligence agencies.

With the aim of achieving the right balance in the intelligence oversight system overall, what is the right emphasis between reform of parliamentary oversight and other independent oversight?

We support the Intelligence and Security Committee becoming a committee of Parliament and welcome the proposal for public evidence sessions. A stronger Intelligence and Security Committee would be welcome, but this must not be used as a way to undermine the ability of the judicial system to order the disclosure, or the hearing in open, of allegations that may be embarrassing to, or expose wrongdoing by British government or its agencies.

What changes to the Intelligence and Security Committee could best improve the effectiveness and credibility of the Committee in overseeing the Government's intelligence activities?

The ISC needs to be a proper Commons select committee, with members chosen by MPs. If the US Congress can be trusted with security and intelligence information we do not see why British MPs cannot be trusted with this information.

If more information, and more informative reports were published by the ISC, this would assist public understanding. It would also be helpful if the ISC would engage more with public and media.

At least some of its meetings and decision-making should take place in public rather than private. The ISC powers to require information should be widened and the agency Head should no longer be allowed to veto requests. Any powers to veto or refuse to supply information should be subject to public interest requirements in favour of disclosure and be susceptible to legal challenge.

What changes to the Commissioners' existing remit can best enhance the valuable role they play in intelligence oversight and ensure that their role will continue to be effective for the future?

see above

How can their role be made more public facing?

see above

Are more far-reaching intelligence oversight reform proposals preferable, for instance through the creation of an Inspector-General?

Based on the practice of other countries (including the US and Australia) such an independent figure would have a more effective and more credible role than the existing (part-time) Interception of Communications and Intelligence Services Commissioners.

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